STATE OF MICHIGAN

COURT OF APPEALS

DAVID DUPUIS,

Plaintiff-Appellant,

v

CHRISTOPHER KEMP,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 263880
Wayne Circuit Court
LC No. 04-423859-CZ

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10) in this action involving claims of malicious prosecution and abuse of process. These claims arose out of a prior civil lawsuit in which defendant sued plaintiff for defamation in an attempt, according to plaintiff, to unlawfully punish and silence plaintiff for truthfully criticizing defendant during a local election and to unlawfully prevent plaintiff from doing so in future elections in violation of plaintiff's First Amendment rights and the doctrine of prior restraint. The underlying lawsuit resulted in a "no cause" verdict in favor of plaintiff following a jury trial. Plaintiff argues that, in the present action, the trial court erred in summarily dismissing the case, where the complaint sufficiently stated claims for malicious prosecution and abuse of process, and where plaintiff submitted documentary evidence that created a factual dispute concerning the validity of these causes of action. Plaintiff additionally argues that the trial court erred in excluding various letters that had been exchanged, for the most part, during the pendency of the underlying lawsuit, which the court found to be inadmissible under MRE 408 as being related to negotiations and compromise offers. Finally, plaintiff argues that the trial court erred in striking defendant's attorney from plaintiff's witness list; defendant's counsel represented defendant in the underlying lawsuit and represents him in this action, including the appeal. We affirm.

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The decision to strike a witness from a party's witness list is reviewed for an abuse of discretion. See *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21-22; 697 NW2d 913 (2005); *In re Forfeiture*

of $1,159,420, 194 Mich App 134, 143-144; 486 NW2d 326 (1992). We also review for an abuse of discretion a trial court's ruling regarding whether to admit evidence;[1] however, to the extent that such an inquiry requires examination and interpretation of the rules of evidence, the question becomes one of law that is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Further, questions of law in general are reviewed de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

The elements of an action for malicious prosecution of a civil proceeding are (1) prior proceedings terminated in favor of the present plaintiff, (2) the absence of probable cause for the prior proceedings, (3) malice, which is defined as a purpose other than to secure the proper adjudication of the claim, and (4) a special injury flowing directly from the prior proceedings. *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981); *Young v Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 675; 350 NW2d 790 (1984). MCL 600.2907 provides a statutory basis for an action alleging malicious prosecution, where a civil action was previously commenced for vexation, trouble, or malice. In an action for malicious prosecution, the plaintiff must show malice, which requires that the underlying proceedings be willful, wanton, or reckless, and for purposes that are wrong and against public policy. *Sottile v DeNike*, 20 Mich App 468, 472; 174 NW2d 148 (1969). A plaintiff must also show a lack of probable cause to institute the prior suit. *Pauley v Hall*, 124 Mich App 255, 265; 335 NW2d 197 (1983). A lack of probable cause may not be inferred from malice. *Id.* However, malice may be inferred from a lack of probable cause. *Id.* at 266. In general, malice can be established by reliance on inferences. *Steadman v Lapensohn*, 408 Mich App 50, 55; 288 NW2d 580 (1980). "Indeed, given the very subjective nature of the test for actual malice, circumstantial evidence may be the only kind available on the issue." *Id.* When malice and want of probable cause are alleged in the complaint, but there is no factual proof to support them, dismissal is appropriate. *Sottile, supra* at 472.

"To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman, supra* at 30, citing *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911). To present a meritorious claim of abuse of process, a plaintiff must show that the defendant had used a proper legal procedure for a purpose collateral to the intended use of that procedure. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). There must be some corroborating act that demonstrates the ulterior purpose, and a bad motive alone will not establish an abuse of process. *Id.* The gravamen of the misconduct upon which liability is imposed is not the wrongful procurement of legal process or the wrongful initiation of civil proceedings; it is the misuse of process, no matter whether properly obtained, for any purpose other than that which it was designed to accomplish. *Friedman, supra* at 30 n 18, quoting 3 Restatement Torts, 2d, § 682, comment *a*, p 474. An action for abuse of process lies for the improper use of process following its issuance, not for maliciously causing it to issue. *Friedman, supra* at 31.

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[1] In general, a trial court's decision on a motion in limine is reviewed for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986).

Regarding the argument concerning the admissibility of the letters under MRE 408, we find it unnecessary to decide the issue because, assuming their admissibility, summary disposition was properly granted even when considering the letters.

We conclude that the trial court did not err in granting summary disposition under MCR 2.116(C)(10). Our analysis on this matter requires us to consider the doctrine of prior restraint.

Prior restraints on speech and publication are the most serious and the least tolerable infringements on one's First Amendment rights. *Nebraska Press Ass'n v Stuart*, 427 US 539, 559; 96 S Ct 2791; 49 L Ed 2d 683 (1976). The general rule is that equity will not enjoin libel and slander, rather, the sole remedy for defamation is an action for damages, and there is a heavy presumption that prior restraints on expression are unconstitutional under the First Amendment's guarantee of free speech. 42 Am Jur 2d, Injunctions, § 97, pp 691-692. That being said, the following observations are made in Am Jur 2d:

> However, the prohibition [against prior restraints] is not absolute, as there are exceptional cases in which a prior restraint is acceptable. For instance, an injunction would issue to prohibit a defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to the libel plaintiff's personal reputation and business relations. An injunction restraining the publication of matter defaming a plaintiff personally was proper where there was no adequate remedy at law because of the recurrent nature of the defendant's invasions of the plaintiff's rights, the need for a multiplicity of actions to assert the plaintiff's rights, the imminent threat of continued emotional and physical trauma, and the difficulty of evaluating the injuries in monetary terms. [Am Jur 2d, *supra* at 692.][2]

This Court in *McFadden v Detroit Bar Ass'n*, 4 Mich App 554; 145 NW2d 285 (1966), addressed a situation where the plaintiff contended that the trial court erred in refusing to enjoin libel and restrain dissemination of materials regarding judicial candidates and their qualifications. The *McFadden* panel affirmed, holding:

> [I]t is a familiar and well-settled rule of American jurisprudence that equity will not enjoin a defamation, absent a showing of an independent economic

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[2] It is further stated:

> Absent a prior adversarial determination that a complained of publication is a false or a misleading misrepresentation of fact, it has been ruled that equity will not issue to enjoin libel or slander unless such libel and slander is published (1) in violation of trust or contract or (2) in aid of another tort or unlawful act or injunctive relief is essential for preservation of a property right. Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper. [Am Jur 2d, *supra* at 691.]

> injury – which does not appear in the instant case. The primary reason is an abhorrence of previous restraints on freedom of speech. (See *Near v Minnesota* [1930], 283 US 697 [51 S Ct 625, 75 L ed 1357].) Additional reasons for the denial of injunctive relief are that there is an adequate remedy at law, i.e., an action for damages, and that the defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction. [*McFadden, supra* at 558.]

In *Karhani v Meyer*, 270 F Supp 2d 926 (ED Mich, 2003), the case cited to the trial court by defendant in the case at bar, the defendants sought to enjoin the plaintiffs from distributing leaflets that allegedly contained inaccurate, incomplete, and misleading information concerning an altercation at a Meijer supermarket gas station. The federal district court denied the request for a temporary restraining order (TRO) because, in part, it would constitute an unconstitutional prior restraint of speech under the First Amendment and because the defendants failed to show that the distribution of leaflets posed a serious or imminent threat to the defendants' constitutional right to obtain a fair trial.[3] *Id.* at 931-934. However, the court also noted as follows:

> Courts have long held that "equity will not enjoin a libel" absent extraordinary circumstances. *Metropolitan Opera Ass'n v Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F3d 172, 177 (CA 2, 2001)(discussing numerous cases). As discussed infra, extraordinary circumstances do not exist in this case. The Sixth Circuit has, however, permitted an injunction for statements *found by the trier-of-fact* to be libelous. *See Lothschuetz v Carpenter*, 898 F2d 1200, 1209 (CA 6, 1990) . . . . Thus, while the Sixth Circuit has permitted a remedial injunction for statements found by the trier of fact to be libelous, the circuit has never departed from the general rule prohibiting unconstitutional prior restraints with respect to temporary restraining orders and/or preliminary injunctions absent extraordinary circumstances. In the instant case, there has not been a judical finding of fact that any statements are false and libelous. [*Karhani, supra* at 930 n 4 (emphasis in original).]

Taking into consideration the authorities cited above, we conclude that it would not be improper or reflect any impropriety to generally request in a complaint injunctive relief to prohibit publication of defamatory statements, where the complaint also alleges prior publication of defamatory statements and requests money damages, as was the situation in the present case. While a court might not have the authority to issue an injunction regarding future statements before the substantive merit concerning whether prior statements were indeed defamatory is ruled upon, once the trier of fact determines that certain statements were defamatory, a court should be able to enjoin a defendant from publishing those same defamatory statements in the future. Thus, seeking or requesting an injunction to prohibit publication of defamatory

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[3] The defendants were being sued by the plaintiffs for alleged ethnic intimidation and discrimination, and the defendants moved for the TRO within the same lawsuit.

statements, when coupled with a request for damages for statements already published, does not *in itself* show malice, a want of probable cause, ulterior purpose, or improper use of process. We think it would be prudent for a plaintiff to include such a request in a complaint for defamation damages.

Moreover, any request or demand by defendant in the underlying action that plaintiff agree not to utter or publish defamatory statements in the future in exchange for dropping the suit would not necessarily reflect malice, a want of probable cause, ulterior purpose, or improper use of process. This is so because, for the reasons stated in the preceding paragraph, the result or relief sought through such a request or demand could properly be pursued through court channels in the civil action and be obtained by court order under certain circumstances should no negotiated agreement be reached. Additionally, we see nothing inherently improper or wrong in asking plaintiff to refrain from publishing defamatory statements such that the request would reflect malice, a want of probable cause, ulterior purpose, or improper use of process. The parties could reach an enforceable contract under which plaintiff could agree not to publish defamatory statements. See Am Jur 2d, *supra* at 691. We view the correspondence at issue here as simply reflecting demands for plaintiff to stop publishing allegedly defamatory statements.

In sum, plaintiff failed to create a factual issue regarding elements necessary to sustain claims of malicious prosecution and abuse of process; therefore, summary disposition was properly granted.[4]

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

[4] In light of our ruling, it is unnecessary to address the argument that the trial court erred in striking defendant's attorney from plaintiff's witness list. We also note that, with regard to plaintiff's claim that defendant failed to present documentary evidence in support of the motion for summary disposition, defendant relied on the case evaluation award and denial of summary disposition which were part of the underlying action before the same trial judge handling this action. These matters were subject to judicial notice, and we conclude that defendant properly pursued the motion.